No. 95-1425

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In The

Supreme Court of the United States

October Term, 1996

LUCIOUS ABRAMS, JR., REV. G. L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

REPLY BRIEF OF APPELLANTS

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I. State Policy Was to Create Two Majority Black Districts

Appellees claim that the state's decision to create two majority black congressional districts in 1991 was not an expression of state policy. Members of the reapportionment committee, according to appellees, felt "threatened" and intimidated by then Assistant Attorney General John Dunne who spoke at the Reapportionment Task Force of the National Conference of State Legislatures in Baltimore in June, 1990, and as a consequence "race was the predominant factor relied on by the State's demographer" in creating the state's initial plan. Brief of Appellees Johnson at 7-8; Brief of Appellees Miller at 10-1. The record does not support either contention.

A. *The State's Argument Is Contradictory.* As appellants have previously noted, *see* Brief of Appellants at 35, the state argued in its brief on the merits in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), that its initial plan was a reasonable expression of state policy and that race was not the predominant factor in the redistricting process. The state argued vigorously that:

> It is undisputed that the General Assembly as a whole found the initial [1991 congressional redistricting] plan enacted to be reasonable. It was not perceived as a 'racial gerrymander.' . . . *There is, in fact, no evidence that any legislator or reapportionment staffer ever believed the initial plan to be offensive as a racial gerrymander.*

Miller v. Johnson, No. 94-631, Brief of Appellants Miller at 49 (emphasis in original). The state repeatedly stressed "the undisputed consensus of all of the legislators involved – both white and black, Republican and Democrat – that the first plan was reasonable." *Id.* at 18.

The speaker of the house said that the Eleventh District as drawn in the first plan "suited me," was "obviously" acceptable, and denied that it was "a racial gerrymander." *Johnson v. Miller*, Civ. No. CV194-008

(S.D.Ga.) (*Johnson I*), T. Vol. II, 81. The chair of the house reapportionment committee similarly testified that in enacting the first congressional plan, "[we] thought we had done pretty well." *Johnson I*, T. Vol. III, 252 (Testimony of Bob Hanner). The state complied with the Voting Rights Act, as well as followed its traditional redistricting principles, *i.e.*, "we kept cities and counties intact." *Id.*[1] The appellees' present contention that the initial plan was not a reflection of state policy entitled to deference by the court is contradictory and disingenuous.

B. *Scape-Goating the Department of Justice and John Dunne.* As for coercion by Mr. Dunne, appellees are obviously trying to scape-goat the Department of Justice in general and Mr. Dunne in particular. In the printed version of his remarks at the Baltimore conference, which were given more than a year before the redistricting process began in Georgia, Mr. Dunne noted that following the 1980 census "we interposed Section 5 objections to 24 statewide redistricting plans . . . adopted by ten different states." Pl.Ex. 198, p. 5. While he gave two specific examples of non-compliance with Section 5, one from Georgia and one from California, no reasonable person could have felt "threatened" by Mr. Dunne's remarks.

> Referring to Georgia, Mr. Dunne said that:
>
> There, as many of you know, in a case known as *Busbee v. Smith*, we contended, and the court found, that preclearance could not be granted because the plan was produced, in part, by a desire to dilute black voting strength in the Atlanta area.

Id. at 6. In his concluding remarks, Mr. Dunne, a former state legislator, was both conciliatory and sympathetic to the redistricting task confronting state legislatures. He assured the various state delegations that:

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[1] The private appellees, moreover, never contended in the district court that the initial plan was unconstitutional and introduced no evidence that it was. *Johnson I*, T. Vol. II, 23.

> we understand the problems that you face in attempting to devise and enact new districting plans . . . [b]ut I believe that together we can ensure that the coming round of redistricting efforts will produce plans that provide the full measure of fairness to racial and language minorities required by the Voting Rights Act and the Constitution.

Id. at 13. Mr. Dunne made no mention of whether Georgia was, in his view, obligated to create two majority black congressional districts.

C. *The State's Reasons for Drawing the Initial Plan.* The state made the decision to create two majority black districts for a number of reasons. One was the advocacy of the black members of the general assembly who argued for greater minority participation and racial fairness in congressional redistricting. *Johnson I*, T. Vol. II, 124; T. Vol. III, 234-35; T. Vol. IV, 101, 247-48. The Black Caucus reasoned that because of racial bloc voting and the history of past discrimination, additional majority-minority districts were needed to provide blacks with equal electoral opportunities. *Johnson I*, T. Vol. IV, 228.

The state also believed that it had a duty under the Voting Rights Act to avoid diluting minority voting strength. Both houses, for example, adopted redistricting guidelines in 1991 which included, *inter alia*, avoiding "diluting minority voting strength and . . . comply[ing] with Sections 2 and 5 of the Voting Rights Act." *Miller v. Johnson*, 115 S.Ct. at 2483; *Miller v. Johnson*, No. 94-797, J.App. 65-77. Bob Hanner, chair of the house reapportionment committee, said that adding an additional majority black congressional district was "the positive thing . . . to do." *Johnson I*, T. Vol. III, 252.

The state's concern over Section 2 was far from merely academic. Between 1974 and 1990, Section 2 vote dilution lawsuits were filed against 40 cities and 57 counties in Georgia challenging their at-large systems of elections. *See* L. McDonald, M. Binford & K. Johnson,

"Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 81 (Chandler Davidson & Bernard Grofman eds, 1994). As a result of the litigation, all but one of the cities, and 53 of the counties, changed to district systems containing majority black districts. *Id.* at 100.

As it began redistricting in 1991 the state was aware not simply of the requirements of Section 2 but also the fact that majority-minority districts were generally necessary to provide blacks a realistic opportunity to elect candidates of their choice.

In its brief to this Court, the state acknowledged that other than Andrew Young in 1972 *"[i]n the 500 or so other congressional elections held in Georgia over the past century, no black candidate has ever won in a majority white district."* *Miller v. Johnson*, No. 94-631, Brief of Appellants Miller at 19 (emphasis in original). "Surely," the state argued, "the General Assembly was entitled to assume, as a simple empirical matter, that this compelling historical pattern was likely to continue in the immediate future." *Id.* at 36. In enacting congressional redistricting, therefore, the state had an obvious incentive to adopt a non-dilutive plan and insulate itself from a possible Section 2 vote dilution challenge.

The state was also concerned with complying with Section 5, particularly because *all* of its prior congressional redistricting plans had run afoul of preclearance. The congressional plan initially passed by the state in 1971 discriminated against minorities in several ways and was rejected by the Attorney General under Section 5. The plan divided the concentration of black population in the metropolitan Atlanta area into the Fourth, Fifth, and Sixth Districts to insure that the Fifth would be majority white. *Johnson I*, Stipulations 170, 173, 180 [hereinafter Stip.]; *Busbee v. Smith*, 549 F.Supp. 494, 500 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). The plan also moved the residences of blacks who were recognizable potential candidates from the Fifth to the Sixth District, *i.e.*, Atlanta

Vice-Mayor Maynard Jackson and Andrew Young, who had run for the Fifth District in 1970. Stips. 172, 180; *Busbee v. Smith*, 549 F.Supp. at 500.

The state's 1981 congressional plan was also rejected under Section 5 as being the product of intentional discrimination. It maintained white majorities in nine of the ten districts and increased the black population in the Fifth to 57.3%. Stip. 188. While blacks were a majority (52%) of the voting age population (VAP) in the Fifth District, they were a minority (46%) of registered voters. Stip. 189. The plan, as did the 1971 plan, split the concentrated black population in the metropolitan Atlanta area into three districts, the Fourth, Fifth, and Sixth, to minimize minority voting strength. Stips. 190-91, 195, 206, 234-35; *Busbee v. Smith*, 549 F.Supp. at 515.

The state submitted the plan for Section 5 preclearance and the Attorney General objected. Stip. 183. The state then filed a declaratory judgment action in the District Court for the District of Columbia, which also denied preclearance. Stip. 186. The senate had passed a congressional plan containing a 69% majority black Fifth District, stip. 215, but the house rejected it. Stips. 216-18. Joe Mack Wilson, chair of the house reapportionment committee and the person who played the instrumental role in congressional redistricting, frankly explained to his colleagues that "I don't want to draw nigger districts." *Busbee v. Smith*, 549 F.Supp. at 501; stip. 199. He generally opposed legislation of benefit to blacks, which he referred to contemptuously as "nigger legislation." *Busbee v. Smith*, 549 F.Supp. at 500; stip. 199.

The District of Columbia court concluded – on the basis of "overt racial statements, the conscious minimizing of black voting strength, historical discrimination and the absence of a legitimate non-racial reason for adoption of the plan" – that the state's submission had a discriminatory purpose in violation of Section 5. *Busbee v. Smith*, 549 F.Supp. at 517. As for Joe Mack Wilson, the court concluded that he "is a racist." *Id.* at 500.

The state submitted a remedial plan to the court which increased the black voting age population in the Fifth District to 60%, and the plan was precleared. Stip. 238; M. Barone & Ujifusa, *The Almanac of American Politics* 289 (1984). In deciding to add a second majority black congressional district in 1991, the state was determined to comply with Section 5, less because of the relatively benign comments of John Dunne than to avoid the acute, public embarrassment it had experienced in 1982 in federal district court.

The general assembly's decision to create two majority black congressional districts after the 1990 census was based upon a myriad of contemporary and historical facts and influences. It is a gross oversimplification – and innacuracy – to say that the decision was entirely in response to a speech by John Dunne.

II. The District Court Found Vote Dilution

While the district court refused to draw a second majority black district, it did find that it was necessary to draw a majority black district in the metropolitan Atlanta area in order to comply with Section 2 and avoid the dilution of minority voting strength. The court found that "Section 2 of the VRA required the Court to maintain the Fifth District as a majority-minority district." J.S.App. 18. Appellees, therefore, are plainly wrong in arguing that the record is "devoid" of Section 2 evidence. Brief of Appellees Miller at 29.[2]

Appellees are also wrong in saying that this Court has never addressed the standards applicable to Section 2 challenges to single member districting plans. Brief of

[2] Appellees did not cross-appeal on the issue of the creation of a majority black Fifth Congressional District and may not now argue that the district court erred in doing so. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976) (cross-appeal necessary to present an argument which would afford greater relief than was awarded by the lower court).

Appellees Miller at 30. In both *Growe v. Emison*, 113 S.Ct. 1075, 1084-85 (1993), and *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993), the Court held that "the *Gingles* preconditions apply in challenges to single-member as well as multimember districts." *See also, Johnson v. De Grandy*, 114 S.Ct. 2647, 2654 (1994).

Appellees also say that appellants did not put up evidence "*concerning the probability of black-preferred candidates winning.*" Brief of Appellees Miller at 32 (emphasis in original). While appellants had no such burden,[3] the district court in fact found "a significant drop in the probability of a black candidate being elected as the black percentage of registered voters declines to fifty percent." J.S.App. 26. Appellees do not contend that this finding is clearly erroneous.

III. The Court's Plan Does Not Comply with One Person, One Vote

Appellees rely on *Preisler v. Missouri*, 341 F.Supp. 1158, 1162 (W.D.Mo. 1972), *aff'd sub nom., Danforth v. Preisler*, 407 U.S. 901 (1972), to justify the deviation in this case. *Preisler*, however, was decided prior to *Karcher v. Daggett*, 462 U.S. 725 (1983), and can hardly be authority for the application of the standards enunciated by this Court in its subsequent 1983 decision. Moreover, the holding in *Preisler* that the deviation in question was "minor" and therefore constitutionally permissible is contrary to the holding in *Karcher*, which rejected the argument that relatively small deviations were constitutionally *de minimis*. 462 U.S. at 733.

Finally, while *Preisler* was summarily affirmed, the one person, one vote issue was not directly presented to

[3] Under *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986), plaintiffs are required to show that minority favored candidates are "usually" defeated by majority bloc voting, not the "probability" of minority preferred candidates winning.

this Court. *See Danforth v. Preisler*, 40 U.S.L.W. 3561 (1972). Accordingly, the affirmance by the Court does not extend to an affirmance of the district court's ruling with respect to the one person, one vote issue. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (the precedential effect of summary affirmance extends no further than "the precise issues presented and necessarily decided by those [summary] actions"); *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979).

A. *The State's County Unit Policy Does Not Excuse Non-Compliance.* The state argues that Georgia has "a strong historical interest" in keeping counties intact in redistricting which justifies the deviations in the district court's remedial plan. Brief of Appellees Miller at 14. First, a state's policy of keeping counties intact cannot trump one person, one vote. *Kirkpatrick v. Preisler*, 394 U.S. 526, 533-34 (1969). Second, the state's policy of maintaining counties intact is rooted in the county unit system, whose purposes were to avoid apportionment based on population and to exclude blacks from effective participation in the political process.

The county unit system, which was invalidated in 1963 in *Gray v. Sanders*, 372 U.S. 368 (1963), was the scheme by which the rural, underpopulated counties maintained control of the state legislature,[4] and by which

[4] Under the Neil Primary Act of 1917, which codified the state's county unit system and provided the method for nominating candidates for statewide office in the primary elections, counties were assigned twice as many unit votes as they had representatives in the lower state house. The eight most populous counties each had three representatives and six unit votes apiece; the next 30 had two representatives each and four unit votes; and the remaining 121 had one representative each and two unit votes. *Gray v. Sanders*, 372 U.S. at 371 n.1. The smallest counties with one-third of the total population of the state controlled a majority of the county units. *Id.* at 373.

black political influence was minimized. According to the three judge court in *Johnson I*:

> Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations.

T. Vol. V, 142 (Statement of Judicial Notice). *See also Busbee v. Smith*, 549 F.Supp. at 499 (one of the purposes of the county unit system was "to destroy black voting strength"). The state's treatment of counties is not, therefore, the kind of "legitimate, consistently applied policy" that might excuse good faith compliance with one person, one vote. *Karcher v. Daggett*, 462 U.S. at 741.

B. *Appellants Did Not Waive Compliance with One Person, One Vote.* Appellees also wrongly contend that appellants have "waived" compliance with one person, one vote by presenting to the court a proposed plan that contained a deviation of .93%. Brief of Appellees Miller at 41. First, one of the plans advanced by appellants, Plan A, had a deviation of only .29%, which is lower than the deviation contained in the court ordered plan. J.App. 194-95.

Second, counsel for appellants stressed that the court "has really got to be concerned about deviations in any plan. . . . There is no *de minimis* deviation and a jurisdiction is obligated to make a good faith effort to comply with population equality concepts." T., Oct. 30, 1994, 281-82. Counsel repeated that "the Court ought not to fall into the trap of thinking that there are *de minimis* deviations." *Id.* at 283. Counsel specifically said that "if the Court is going to have a higher deviation . . . you must be careful to articulate the reason for doing so;" that the deviation in one of appellants' plans was .93%; "that you could split some counties . . . and cure those deviations;" and that appellants' plan preserving counties intact *and* creating two minority districts "may" be acceptable

under *Karcher v. Daggett*. *Id.* at 283-84. Counsel concluded that there would be "a serious legal issue if the Court were to draw a plan [with a high deviation] that contains less than two minority districts." *Id.* at 284. In light of the above colloquy, it is apparent that appellants did not waive any objections they might have to the court's failure to comply with one person, one vote.

IV. Section 5 Standards Apply to Court Ordered Plans

Appellees make the remarkable, and erroneous, claim that federal courts may implement remedial plans in total disregard of Section 5's retrogression standard. Brief of Appellees Miller at 43. While federal court ordered plans are not required to be submitted for preclearance,[5] the Court in *McDaniel v. Sanchez*, 452 U.S. 130, 149 (1981), quoted with approval the language of the legislative history of the act, S.Rep. No. 295, 94th Cong., 1st Sess. 18-19 (1975), that federal court ordered plans "should follow the appropriate Section 5 standards, including the body of administrative and judicial precedents developed in Section 5 cases."

Federal court ordered plans are exempt from preclearance under Section 5 because there is a presumption that "the federal interest" will be adequately protected by the federal courts. *McDaniel v. Sanchez*, 452 U.S. at 150. But that is a far cry from saying, as do appellees, that federal courts can simply ignore the federal interest in Section 5. Indeed, a federal court has, if anything, a greater obligation than the states to apply and follow federal constitutional and statutory standards in implementing remedial plans.

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[5] State court orders implementing changes in voting are subject to Section 5 preclearance. *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16 (1982); *Gresham v. Harris*, 695 F.Supp. 1179, 1182 (N.D.Ga. 1988), *aff'd sub nom., Poole v. Gresham*, 495 U.S. 954 (1990).

Federal court ordered plans must comply more strictly with equal population standards than those enacted by a legislature, *Chapman v. Meier*, 420 U.S. 1, 27 (1975), they must be "free from any taint of arbitrariness or discrimination," *Roman v. Sincock*, 377 U.S. 695, 710 (1964), and they must meet "special standards . . . of racial fairness." *Upham v. Seamon*, 456 U.S. 37, 39 (1982). It would be strange indeed to hold a federal district court to lower standards of racial fairness and non-retrogression than state legislatures.[6]

Appellees' argument that a court could or should ignore Section 5 is further undercut by the body of law holding that federal courts apply Section 2 in shaping court ordered plans. *See Winter v. Brooks*, 461 U.S. 921 (1983) (*vacating and remanding Jordan v. Winter*, 541 F.Supp. 1135 (N.D.Miss. 1982) "for further consideration in light of Section 2 of the Voting Rights Act of 1965"); and *SRAC v. Theodore*, 113 S.Ct. 2954 (1993) (vacating and remanding "for further consideration in light of the position presented by the Solicitor General in his brief for the United States," which argued that the lower court "erred in failing to consider thoroughly whether its remedial

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[6] Lower federal courts have applied Section 5 standards as a matter of course. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1417-19 (7th Cir. 1984) (applying Section 5 "retrogression" analysis in determining liability and in establishing guidelines for a remedial plan); *Burton v. Sheheen*, 793 F.Supp. 1329, 1345 (D.S.C. 1992) (in fashioning a court ordered plan the court "must be cognizant of § 5 concerns that voting changes have neither the 'purpose . . . [nor] the effect of denying or abridging the right to vote' on the basis of race"), *vacated and remanded on other grounds sub nom., SRAC v. Theodore*, 113 S.Ct. 2954 (1993); *Seamon v. Upham*, 536 F.Supp. 931, 944 (E.D.Tex. 1982) (a court ordered plan must comply with Section 5 and have "neither a racially discriminatory purpose nor effect"), *vacated and remanded on other grounds sub nom., Upham v. Seamon*, 456 U.S. 37 (1982).

redistricting plans comply fully with Section 2," Brief for the United States as Amicus Curiae at 18).[7]

A. *The Court's Plan Is Retrogressive.* Given the state's demographics, a plan that contains only one majority black district is retrogressive within the meaning of Section 5, and that is true whether the benchmark is the 1982 plan, the 1991 plan, or some other plan embodying the state's redistricting goal of creating two majority black districts. If, however, the state's black population had declined, or disappeared altogether, appellants would not argue that the benchmark for retrogression would remain unchanged.

The black population in Georgia in fact increased from 1,464,435 in 1980 to 1,746,565 in 1990. *1980 U.S. Census of Population, General Social and Economic Characteristics, Georgia, PC80-1-C-12,* Tables 56 and 58; *1990 U.S. Census Population Figures, Georgia,* p. 1. The white population also increased, but the black overall percentage increased slightly from 26.8% in 1980 to 26.9% in 1990. *Id.* Again, in light of the state's demographics, the court ordered plan, which contained one of eleven majority black districts, was retrogressive compared to the 1980 plan, which contained one of ten majority black districts.[8]

The state appellees' argument that *City of Richmond v. United States,* 422 U.S. 358 (1975), contains a "good government" exception to Section 5 is misplaced. *City of Richmond* held that municipal annexations were not objectionable under Section 5 where the resulting districting "system fairly reflects the strength of the Negro community as it exists after the annexation." 422 U.S. at 371. The

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[7] The lower courts have similarly held that court ordered plans must conform to Section 2. *See, e.g., Dillard v. Crenshaw County,* 831 F.2d 246, 249 (11th Cir. 1987); *Hastert v. State Board of Elections,* 777 F.Supp. 634, 646 (N.D.Ill. 1987).

[8] This method of determining retrogression is virtually identical to the "straightforward" approach taken in *Beer v. United States,* 425 U.S. 130, 141 (1976).

court ordered plan in this case does *not* fairly reflect the strength of black voters as it currently exists. Under the rationale of *City of Richmond,* the court's plan is retrogressive.

V. There Was No Section 2 Hearing on the Court's Plan

Appellees mistakenly claim that appellants were given a hearing on their Section 2 "dilution claim." Brief of Appellees Miller at 34. The district court did conduct a hearing at which it allowed the parties an opportunity to present proposed remedial plans and to present evidence that their plans complied with Section 2, but it did not hold a hearing to allow the parties an opportunity to comment and present evidence concerning the plan the *court actually adopted.* Appellants believe the court erred in light of *SRAC v. Theodore,* 113 S.Ct. at 2954.

The Johnson appellees argue that allowing a Section 2 hearing after a court ordered plan was adopted would be "problematic." Brief of Appellees Johnson at 21. But such a procedure was precisely the one contemplated by the dissenting member of the three-judge court. Judge Edmondson expressed the view that:

> the Court would present a Court designated plan, but not order its implementation. Rather we would put it on the table for comment from counsel and so forth which, and again just speaking for myself, I think is a good idea. The idea of putting it on the table and letting everybody have a chance to say bad things about it before we signed on it as being our order.

T., Aug. 22, 1995, 46.

Allowing the parties to comment on a court ordered plan would also promote judicial economy by providing an opportunity for bringing any defects in the plan to the attention of the court for correction and perhaps obviating the need for appeal. *See, e.g., In re Perez,* 30 F.3d 1209, 1213 (9th Cir. 1994) ("[t]he principal reason we require

parties to raise an issue in the trial court is to give that court an opportunity to resolve the matter and, hopefully, avoid error"); *First National Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1339 (6th Cir. 1987) (the requirement that issues be presented and resolved in the trial court promotes "judicial economy"). Under the procedure adopted by the district court here, there is no opportunity to correct defects in the court ordered plan except by direct appeal to this Court.

VI. Appellants' Proposed Plans Follow Traditional Districting Principles

While appellees concede that the creation of a second majority black district is "technically feasible," Brief of Appellees Miller at 33, they claim that appellants' proposed plans were "predicated largely on the basis of race" and "intentionally cracked counties." *Id.* To the contrary, appellants submitted several plans, all of which were designed to correct the constitutional defects in the existing plan and none of which subordinated traditional redistricting principles to race.

Given the conflicting goals of keeping counties intact and maintaining a low deviation, appellants' plan with the lowest deviation, Plan A, split the greatest number of counties.[9] By contrast, the plan which split the fewest number of counties, ACLU1A (the least-change plan), had a deviation of .93%. Under the least-change plan the Eleventh District is composed of 14 whole counties; only two counties (both urban) are split, Richmond and

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[9] The Johnson appellees are wrong in claiming that the district court "specifically found" Plan A to be unconstitutional. Brief of Appellees Johnson at 11. The district court made no specific mention of Plan A – or any other plan proposed by the Abrams appellants. Nor is the deviation in Plan A "unknown." *Id.* The computer error is minor, and when corrected the total deviation remains .29%.

DeKalb. The court's plan, of course, also split urban counties.[10]

Appellees are incorrect in arguing that appellants have tried "to cover up the fact" that the Second District in their proposed plans contains some members of the military. Brief of Appellees Johnson at 13.[11] Members of the military are counted in the census and have to be allocated in any redistricting plan. Moreover, there are military installations in numerous counties throughout the state, *e.g.*, in Bibb (Warner Robins Air Force Base), in Camden (Kings Bay Submarine Base), in Chatham (Hunter Army Airfield), in Chattahoochee (Fort Benning), in Clayton (Fort Gillem), in Cobb (Dobbins Air Force Base), in Lowndes (Moody Air Force Base), in Richmond (Fort Gordon), in Fulton (Fort McPherson), and in Liberty (Fort Stewart). Under the court's plan there are substantial military populations in Districts One, Two, Five, Six, Eight, and Ten. J.S.App. In any case, the black voting age population (VAP) in the Second District in the Abrams appellants' least-change plan is 45.5%. Even if adjusted for the military, it is not majority-minority.

Reduced to its essentials, appellees' argument is that it is unconstitutional to create a district that has even a

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[10] Although it is irrelevant to any issue in this case, Donald Hill, a demographer employed by the Georgia Republican Party, did not, as appellees claim, Brief of Appellees Johnson at 12, "work for" the ACLU, nor did he "draw" any of the plans advocated by the Abrams appellants. All of the Abrams plans were drawn by Selwyn Carter, J.App. 141, who expressly denied Mr. Hill's involvement in their construction. T., Oct. 30, 1995, 327-28.

[11] Appellees claim that the military population is "non-voting," but they introduced no evidence of military voting patterns, nor did the district court make any findings about such patterns. On the record in this case, the extent to which members of the military vote is a matter of speculation.

substantial minority population, and that to survive challenge a redistricting plan must be gerrymandered for white voters by fragmenting the minority population to the greatest extent possible. Nothing in the decisions of this Court countenances such a radical result.

VII. The Decision Below Is Not Shielded by the Clearly Erroneous Rule

Rule 52(a), Fed.R.Civ.P., does not restrict the power of an appellate court to correct errors of law, "including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986), *quoting Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). The district court in this case made numerous errors of law which infected the fact finding process, *e.g.*, that it was "not bound by *Upham*," J.S.App. 5, that it had to proceed as if the state had adopted "no plans," J.S.App. 7, and that adopting a remedy that would be "minimally disruptive . . . was not an option." J.S.App. 29.

The district court's refusal to accord appropriate deference to the existing plan is both a mixed finding of law and fact as well as a finding that is predicated on a misunderstanding of the law. In either case, the court's subsidiary and ultimate findings are not, as appellees contend, shielded by the clearly erroneous rule. Brief of Appellees Miller at 23.[12]

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[12] For example, the court's finding that "future growth" in population justified the relocation of the Eleventh District in the northeast Atlanta corridor, J.S.App. 13, isn't entitled to deference under Rule 52(a) as appellees suggest, Brief of Appellees Miller at 24, because the court erred as a matter of law in totally disregarding the state's decision to locate the Eleventh District southeast from south DeKalb County.

A. *The Section 2 Record Involving the Second Congressional District Was Not Fully Developed.* Appellants reiterate that the Section 2 record concerning the unconstitutionality of the Second District was not fully developed. None of the parties vigorously defended the district. The state stipulated that race was the predominant factor in drawing some of the district lines, but it failed to put up evidence that other lines were drawn for non-racial reasons or that they were based on the state's traditional districting principles. Because of the absence of such evidence, the district court concluded that no part of the Second District could serve as a guide for a remedial plan. Whether or not appellants could have convinced the court to find the Second District constitutional, they could have established that some portions of the district were unobjectionable and thus that there was no basis for the court to proceed as if the state had drawn "no plans." J.S.App. 7.[13]

Appellants were able to argue at the remedy phase that their proposed plans complied with Section 2, but they were not allowed to put up evidence about the non-racial factors that went into the construction of the Second District, nor the extent to which the state relied upon traditional districting factors. Accordingly, no deference is due the district court's finding under Rule 52(a) that it was unable to use the existing plan "as the basis for a remedy." J.S.App. 6.

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[13] In an effort to shore up the district court's start-from-scratch approach, appellees claim that the "economic communities of interest" identified by the court provide "much of the rationale" for the location of the districts. Brief of Appellees Johnson at 25 (*citing* 922 F.Supp. at 1565, J.S.App. 17). The economic interest identified in District Two was "peanut production," in District Nine it was "carpet production," and in District Eleven it was "poultry production." J.S.App. 17. That peanuts, carpets, and chickens should provide the "rationale" for the existing districts underscores how arbitrary the plan is.

VIII. The Court's Plan Has Not Been Vindicated

Appellees claim that the court ordered plan is "vindicated" because the two black incumbents (Cynthia McKinney and Sanford Bishop) who were drawn into majority white districts were nominated in the Democratic primary. Brief of Appellees Johnson at 31.[14] McKinney and Bishop undoubtedly won nomination because they ran with the benefits of incumbency.[15] Their nomination does not mean that non-incumbent minority candidates will do as well.

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[14] While appellants acknowledge that both McKinney and Bishop were nominated, no formal request for notice was made nor have the election returns been provided as contemplated by Rule 201(d), Fed.R.Evid. ("[a] court shall take judicial notice if requested by a party and supplied with the necessary information"); *See Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 256, 277 (2d Cir. 1981) (refusing to take judicial notice where insufficient information was supplied). In the absence of precinct returns, there is no way of knowing the black-white turnout in the primary, how many whites voted in the Democratic primary, or the extent of racial bloc voting. More important, this Court has consistently held that it "must affirm or reverse upon the case as it appears in the record." *Russell v. Southard*, 12 How. 139, 158-59 (1851); *accord, Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970). In addition, the district court's failure to accord any deference to the state's plans or to comply with one person one vote could not be cured by the nomination of McKinney and Bishop.

[15] *See, e.g.*, G. King & A. Gelman, "Systemic Consequences of Incumbency Advantage in U.S. House Elections," 35 *Am.J.Pol.Sci.* 110, 112-16 (1991) (estimating the incumbency advantage over the last decade to be between 6 and 12 percentage points); *see also*, Daniel Hayes Lowenstein, *Election Law* 656, Table 15.1 (1995) (noting that from 1946 to 1994, incumbent Representatives built a record on which they could seek re-election and with the strong benefit of incumbency were three and one-half times as likely to lose in a general election as a primary).

If anything, the nomination of McKinney and Bishop vindicates the legislature's creation of majority black congressional districts in 1992. The creation of such districts has not had the polarizing effect appellees claim; it has apparently had the opposite effect. It has allowed qualified minorities to run in highly integrated majority-minority districts and thus secure an entree into the political process which they would otherwise likely be denied.

According to one veteran observer of the voting rights scene,

> the creation of majority-minority districts and the subsequent election of minority candidates reduces white fear and harmful stereotyping of minority candidates, ameliorates the racial balkanization of American society, and promotes a political system in which race does not matter as much as it did before.

F. Parker, "The Constitutionality of Racial Redistricting: A Critique of *Shaw v. Reno*," 3 *D.C.L.Rev.* 1, 19-20 (1995); Brief Amicus Curiae of the Georgia Association of Black Elected Officials at 18-19. The record in this case supports this positive assessment.

In Georgia, the Second and Eleventh Districts became majority black for the first time in 1992. *Miller v. Johnson*, 115 S.Ct. at 2483-84. From 1984 to 1990, only 1% of white voters in the precincts within the Second, and only 4% of white voters in the precincts within the Eleventh, voted for minority candidates in statewide elections. An encouraging increase in white crossover voting occurred in 1992. Twenty-nine percent of white voters in the Second and 37% percent of white voters in the Eleventh voted for minority candidates in statewide elections that year. *Johnson I*, DOJ Ex. 24, Tables I-III. The court's plan, with its destruction of integrated majority-minority districts, is a step backwards from the goal of equal political participation.

CONCLUSION

For the above reasons, this Court should reverse the decision below.

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